No. 11,703

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

GEORGE B. CAREY,
Appellant,

vs.

HILO FINANCE & THRIFT CO., LTD.,
a corporation,
Appellee.

Upon Appeal from the Supreme Court of the Territory of Hawaii.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

This is an appeal pursuant to Section 128 of the Judicial Code, amended (28 U.S.C. 225) from a final decision and judgment of the Supreme Court of Hawaii (R. 297, 309). The value in controversy, exclusive of interest and costs, exceeds $5,000.00 (R. 297); judgment of the Supreme Court was entered on April 30, 1947 (R. 309); petition for a rehearing was denied on May 1, 1947 (R. 312); appeal was filed on June 19, 1947 (R. 313).

STATEMENT OF THE CASE.

The appellant's statement of the case is such a mixture of contention, legal theory and disputed fact that appellee believes it necessary to present a fair and concise statement of facts as found by the trial court and the Supreme Court. For convenience following appellant's brief, appellant is referred to throughout as "defendant" and appellee as "plaintiff".

(a) Summary statement of facts.

This is an action to recover the sum of $4,971.84 on eight promissory notes. The defendant interposed the defense of usury, and counterclaimed for interest paid on thirty-eight fully paid promissory notes in the amount of $6,188.62. A judgment for the plaintiff as prayed for and dismissing the counterclaim was affirmed by the Supreme Court from which the defendant appeals.

The plaintiff is a corporation duly licensed as an "industrial loan and investment company" under the provisions of Act 231 (Series D-140, Session Laws of Hawaii 1937) (R. 55). The corporation had originally been licensed as "money lender" under the provisions of Act 154, Session Laws of Hawaii 1933, which statute was repealed and superseded by said Act 231. The defendant, as an individual, engaged in business in selling sewing machines under conditional sales contracts to purchasers throughout the Territory. The defendant required substantial financial assistance in his business (R. 138, 300) and borrowed money from the plaintiff under terms conforming generally to

those covering loans made by the plaintiff in its business (such rates and terms being on file in the office of the Bank Examiner) and conforming to the terms of loans made by industrial loan companies operating generally throughout the Territory (R. 63, 251). The court below accurately characterized the relationship between the parties as follows: "In 1934, preliminary to entry into the relationship, the parties had an oral understanding that the defendant upon an estimate of his business needs for money would, from time to time, apply for a loan when he had sufficient sale contracts of his customers to offer as collateral security; that the plaintiff, if it accepted the application, would make the loan deducting interest in advance; that execution of the contract would be upon plaintiff's printed form of installment promissory note; that plaintiff to accommodate defendant would extend the ordinary period of one year to that of fifteen months and agree to make substantial rebates of interest for prompt payment of monthly principal installments. This understanding did not look forward to a single loan to be repaid by serial notes, nor did it regard prospective loans as one transaction or as a running or open account, but rather as distinct undertakings and different contracts to be settled and closed separately, each being one into which both parties would be free to enter." (R. 300-301.)

It is clear as found by the courts below that there was no agreement or contract under the terms of which defendant was required to borrow money from the plaintiff (R. 301) and at any time the defendant

had the option of paying off his indebtedness and of terminating his dealings with the plaintiff (R. 140, 301). In accordance with the practice in the industry legalized by statute, loans were in fact made from time to time in an amount sufficient to enable interest charges to be deducted in advance (R. 64, 250) and such deductions of interest were made at the rate of less than 1% per month, computed on the face amount of the note and provisions were made in each note for repayment of the loan in fifteen equal installments. Thus, on a loan of $2,330.00 payable over a period of fifteen months on which, under the statute as administered by the Bank Examiner and construed by the Supreme Court (R. 250, 305), the plaintiff was entitled to deduct 15% in advance, or $349.50. The actual amount deducted was $330.00, and in addition, if the note was paid promptly, a rebate of interest was made by the plaintiff to the defendant equal to one-third or one-fourth of the prepaid interest (R. 61, 199-225), so that defendant paid substantially less than the charges permitted to be made and the rates approved by the Bank Examiner pursuant to the statute. The amount of the rebate varied from time to time (R. 199-225). In some cases a portion of the proceeds of the loan were used for the purpose of paying other obligations of the defendant to the plaintiff; in other cases a portion of the proceeds of a loan were used to pay obligations of the defendant to persons to whom the defendant was indebted; and in still other cases, the proceeds of the loan were used to pay prior obligations of the defendant and a portion paid

to the defendant in cash (R. 199-233). The money was applied either as directed or consented to by the defendant who was carrying on an expanding profitable business (R. 129-130, 141, 144, 147). It was stipulated at the trial that with respect to each loan made by the plaintiff, *interest was deducted in advance,* and by stipulation of the parties, detailed statements of the loans made by the plaintiff and the payments made by the defendant on each loan were received in evidence (R. 22, 25, 191, 194, 199-231). These exhibits support with mathematical certainty the findings made by the Supreme Court that "as a matter of law and fact none of the notes or combination thereof is infected with usury, nor is any violative of either the criminal or civil statutes on usury". (R. 305.)

Defendant attempts in his brief as he did in the Supreme Court (Appellant's Br., Appendix II) to place on the series of loans made, an ingenious, but factually unsupported interpretation for the purpose of showing that the loans taken as an entirety violated the usury statutes under an interpretation of the statutes, which the highest court of the Territory refused.

(b) Summary statement of statutory background.

Usury in Hawaii is purely a matter of statutory restriction, *Helbush v. Mitchell,* 34 Haw. 639.

Until 1933 there were no regulatory statutes in Hawaii relating to money lenders (other than licensed pawn brokers). Under the provisions of Act

154 of the Session Laws of Hawaii 1933,[1] a general regulation was provided for persons who obtained licenses as money lenders. This act was repealed and superseded by Act 231, Session Laws of Hawaii 1937,[1] known as the "Industrial Loan and Investment Company Law".[2] The 1937 act was substantially modified and clarified by Act 75, Session Laws of Hawaii 1939. The administration of the 1933 Act and the 1937 Act, as amended by the 1939 Act was entrusted to and has at all times remained with the Bank Examiner of the Territory of Hawaii. Under the 1937 Act, the Bank Examiner was empowered to issue licenses after being satisfied with the showing made by the applicant (Sec. 6782-E); was directed to receive periodical reports and statements of statutory licensees (Sec. 6782-X); and was required to make periodical examinations of such licensees for the purpose of ascertaining whether the provisions *"particularly as to interest and other charges"* were being complied with (Sec. 6782-CC).

The testimony of the Bank Examiner discloses that approximately 80 licenses were issued under the 1933 Act (R. 246) and that substantially all licensees were making charges in the manner adopted by the plaintiff (R. 251), and that unless finance companies were permitted to deduct interest in advance in the man-

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[1]These Acts, for brevity where the context is clear, will be referred to hereinafter as the "1933 Act", the "1937 Act" and the "1939 Act", respectively.

[2]The Act is known as "The Industrial Loan and Investment Act" (Sec. 6782, M-M) and the statutory licensees are called "Industrial Loan and Investment Companies" in the 1937 Act. In the 1939 Act the title was shortened to "Industrial Loan Companies", which title is used for convenience throughout this brief.

ner provided by statute, finance companies could not operate profitably (R. 258-259); that finance companies licensed under the 1933 Act and the 1937 Act were an absolute need in the community; that the Bank Examiner's department was fully informed as to the rates that were being charged, and that by granting licenses, it approved the charges (R. 274); that the outstanding loans of finance companies according to annual reports for recent years, show an amount in excess of $6,000,000.00 (R. 275); and that in excess of 90% of the outstanding loans made by the finance companies provided for interest substantially as paid or charged in the case at bar (R. 276).

Helbush v. Mitchell, supra, was decided by the Supreme Court on October 21, 1938. This case involved a clear violation of the 1933 Act, but the Supreme Court in applying the penalty applicable to the violator of the usury law, created some doubts as to the circumstances under which a usurious contract could be purged. The Bank Examiner's Department of the Territory then prepared and sponsored the bill that became Act 75, Session Laws of Hawaii, 1939, which became effective April 22, 1939 (R. 260). By the Act, legislative approval was given to the administrative construction of the 1937 Act which had theretofore been adopted by the Bank Examiner's department (R. 260) and the Act had the effect of clarifying, so far as the legislature could constitutionally act, any and all questions with respect to the propriety of the charges theretofore made by the industrial loan companies for loans of money. This result was

achieved by the legislature providing (a) that the defense of usury shall not be available in an action brought by a statutory licensee, if the licensee has not contracted for interest at a greater rate than would have been permitted under the 1939 Act if that Act had been in force and effect at the time that the note was made (Sec. 2, Act 75, Session Laws of Hawaii 1939); (b) any statutory licensee could purge any existing loan from usury by refunding within a set period the excess above what could have been legally collected under the 1939 Act (Sec. 3, Act 75, Session Laws of Hawaii 1939); and that (c) no action shall lie against any statutory licensee under the 1933 or 1937 Acts to recover interest or charges which were legally chargeable or collectible (Sec. 4, Act 75, Session Laws of Hawaii 1939). This latter section was merely a statutory codification of the ruling adopted in *Carey v. Discount Corp.*, 36 Haw. 107, that interest voluntarily paid could not be recovered after payment on the ground of alleged usury.

(c) Decisions of the courts below.

The trial court found as a fact that the promissory notes described in the complaint were executed and delivered to the plaintiff (R. 281) and that the amount remaining unpaid on the notes were the amounts claimed in the petition (R. 282); that the defendant admitted that interest in the "sum of $330.00 was deducted from the principal of each note on account of interest at the time the loan was made". (R. 282.)

The trial court did not consider it necessary to make any finding as to whether the interest charged was or was not in violation of the 1937 Act because under the 1939 Act the defense of usury was not available to the defendant (R. 291); that the Legislature had clear constitutional power to repeal or amend the usury laws retroactively (R. 286, et seq.); that the decision in *Carey v. Discount Corp.*, 36 Haw. 107, as well as Sec. 4 of Act 75, Session Laws of Hawaii 1939, precludes the recovery of interest already paid; that under the 1939 Act plaintiff charged no more than it was entitled to charge as a statutory licensee.

The Supreme Court held on appeal that there was "not a scintilla of evidence in the record tending to prove that the parties in contemplating loans intended to evade any provisions of the Act [the 1937 Act as amended] or any statute on usury"; that the exceptions "assigning a corrupt agreement to commit usury, are untenable and without merit" (R. 302); that at the time the notes were executed, plaintiff had full and continuing statutory authority to deduct interest in advance; that since under the 1937 Act no excessive interest had been charged, it was unnecessary to consider the effect of the 1939 Act or its constitutionality.

Peters, J., in a concurring opinion stated it was unnecessary to decide whether the notes were usurious under the 1937 Act because by the "immunizing provisions of the 1939 Act" the defendant had been foreclosed from the defense of usury.

(d) Questions presented.

1. Is the statutory construction by the Supreme Court of the Hawaiian Industrial Loan Act (Act 231, Session Laws of Hawaii, 1937) so arbitrary, unreasonable or manifestly erroneous as to warrant the interference by this court?

2. Assuming, without conceding, that the statutory construction of the 1937 Act by the Supreme Court was in error, did the Legislature of the Territory of Hawaii lack constitutional power to amend the Act and repeal the defense of usury retroactively as to licensed industrial loan companies operating under the jurisdiction of the Bank Examiner?

ARGUMENT.

I.

THE ADMINISTRATIVE AND JUDICIAL CONSTRUCTIONS OF THE TERRITORIAL INDUSTRIAL LOAN COMPANY LAW ARE REASONABLE AND PROPER AND MUST BE ACCEPTED AS STATING THE RULE OF THE TERRITORY.

The appellant's brief does nothing to clarify the matter of statutory construction. As we understand it, counsel would have this court of appeal now rule that forty statutory licensees operating in the Territory under the jurisdiction of the Bank Examiner and making charges strictly in accordance with his rulings and directions and in accordance with the statutes as construed by the highest court of appeal in the Territory were guilty of "criminal usury". To arrive at this conclusion, the appellant must ask the

court to make a completely new finding of fact on the basis of the very factual arguments rejected in the court below. While it is submitted that the opinion of the Supreme Court is unassailable, we shall show in detail hereunder why the statutory construction is reasonable and unassailable on appeal.

1. The 1937 Act has been correctly construed by the Supreme Court.

The burden of the appellant's brief is that the Supreme Court did not correctly apply the principle of *Helbush v. Mitchell, supra,* which the Supreme Court found inapplicable to the case at bar. In the case at bar, it was stipulated, and the Supreme Court found that $330.00 was deducted from the principal of each note on account of interest "deducted in advance" (R. 304), and that the deduction did not exceed the limit fixed by Section 4 (a) of Act 154, Session Laws of Hawaii 1933, or Section 6782-N added by Act 231, Session Laws of Hawaii 1937 or by Section L-2 (a) of the amendatory Act 75, Session Laws of Hawaii 1939.[3] In the *Helbush* case, *supra,* the court having found that the interest involved was not deducted in advance and was in fact in excess of the greatest amount that could have been charged; hence, for his remedy, the lender was relegated to the provisions of Section 7053, Revised Laws of Hawaii 1935 (general usury statute).

The 1937 Act by definition regulates persons, etc., "engaged in the lending of money to be repaid in

[3]For convenience, the provisions referred to are set out in the appendix hereto.

weekly, monthly or other periodical installments of principal sums as a business." (Sec. 6782-A (4).)

The term "engaging in the business of an industrial loan and investment company" is defined to "mean and include the money to be repaid in weekly, monthly or other periodical installments of principal sums, and * * * the purchase or discount of installment paper from another" (Sec. 6782-A (5)).

Under the provisions of Sec. 6782-E a license is required to be obtained in order to obtain the benefits of law. It is specifically provided that no unlicensed person "shall possess or exercise, unless expressly given and possessed or exercised under other laws, any of the benefits, rights, powers or privileges which are herein conferred upon licensees hereunder".

Under Sec. 6782-F applications for licenses must be made with the Bank Examiner showing the fitness of the applicant and also that the business will promote the convenience of the locality or community in which the business of the applicant is to be conducted.

Sec. 6782-M sets out the specific powers of licensees, including the power to make loans and "contract for such interest, discount or other consideration permitted by this chapter".

In Sec. 6782-N the permissible rates of interest are prescribed. This section is discussed hereunder in detail.

The balance of the chapter contains detailed provisions relating to the operation of statutory licensees

and the manner in which they are permitted to conduct their business. In Sec. 6782-W the Bank Examiner is given authority with the approval of the Governor to promulgate regulations not inconsistent with law.

By Sec. 6782-X detailed reports are required to be made to the Bank Examiner and published from time to time.

By Sec. 6782-CC, the Bank Examiner is required to make examinations of statutory licensees to see whether all matters of law "and particularly as to interest and other charges are being complied with".

The provisions of the *1937 Act* relating to interest read as follows:

> "Sec. 6782-N. *Rate or rates of interest.* No industrial loan and investment company, subject to the provisions of this chapter, shall directly or indirectly charge, contract for, collect or receive any interest, discount, fees, charges or other consideration on any loan or loans made by it except as provided by this section.
>
> "Interest on loans made by any industrial loan and investment company, subject to this chapter, may be deducted in advance at the rate of but not exceeding one per centum (1%) per month, and in addition, the company may require and receive weekly, monthly or other periodical installments with the privilege to the company to declare the entire unpaid balance due and payable in the event of default in the payment of any installment. No person, firm, association, partnership or corporation (not holding a license issued

> under this chapter) shall charge, contract for, collect or receive interest, discounts, fees, charges or other consideration on any loan or loans in the amount or in the manner provided in this section, unless permitted so to do by other territorial law."

The effect of Sec. 6782-N taken with Sec. 6782-M is to grant to statutory licensees the power which non-licensees do not have, *of deducting interest in advance, and, in addition, receiving uniform weekly or monthly installments of principal.* While it is difficult to follow the appellant's contention, we infer from specifications of error Nos. 5, 6, 7, and 8 that the appellant disputes the validity of the mathematical calculations made by the Supreme Court as to permissible charges under the 1937 Act. The appellant fails to point out how the borrower could pay interest in advance and include the amount of the prepaid interest in the principal amount of the note to be repaid. The Supreme Court said: "Corroborative of the undisputed evidence * * * it is a mathematical certainty that interest at the rate of one per cent a month for fifteen months (the period of each note) on principal amounts of $2,330.00 and $1,165.00 would be $349.50 and $174.75, respectively. The interest on such loans, which in this case was actually deducted in advance in the respective amounts of $330.00 and $165.00, is therefore not usurious, it not being at a rate greater than one per cent per month, but rather at a lesser one." (R. 305.)

2. The legislative background and administrative construction accord with the Supreme Court decision.

The purpose of the statute must be gathered from its four corners. It is clear that the 1937 Act had for its purpose the granting of special privileges not enjoyed by the public generally to licensees who subjected themselves to the governmental controls prescribed therein in accordance with similar practice in various states. It is also clear that any person so long as he charges no more than the interest prescribed by the General Usury Statute (Sec. 7053, Revised Laws of Hawaii 1935) can, without obtaining a license or subjecting himself to the Bank Examiner's supervision, engage in the lending of money at the rate of twelve per cent (12%) per annum.

The 1937 Act was introduced in the 1937 session of the Legislature as Senate Bill 244 and was treated as a companion bill to Senate Bill 245 which provided for the licensing of small loan companies (see Senate Journal (1937), 19th Legislature of Hawaii, p. 1066). In the report of the Senate Judiciary Committee on *Senate Bill 244,* it is stated that the companion bills had for their purpose "the setting up of a proper code under which financial institutions coming within the provisions of this Act may be properly supervised for the mutual good of the public, the companies themselves, and the Bank Examiner." (Senate Journal (1937) *loc. cit., supra.*)

In the report of the House Judiciary Committee on Senate Bill 244, the Committee stated that the bill "gives to industrial loan and investment companies

the rights and privileges which are recognized throughout the mainland United States as theirs." (House Journal (1937), 19th Legislature of Hawaii, p. 2237.)

Even a superficial review of the statutes on the mainland of the United States relating to industrial loan companies, and loan companies of similar character, shows that they have a certain general characteristic: The right is given to such companies to deduct interest in advance on the entire loan and also by the issuance of investment certificates or by direct repayments to secure the repayment of the loan in equal installments. In all the statutes examined the right is given statutory licensees to require the borrower to pay periodical installments without a reduction in the amount of interest charged by reason of such periodical repayments. See for example 1 General Laws of California 1937 (Deering) Act 3603, Secs. 1-12 relating to industrial loan companies; and statutes cited hereinafter.

It is clear from the legislative committee reports and the testimony of the Bank Examiner that the Legislature in 1937, in adopting a comprehensive code covering industrial loan companies, understood and believed that they were giving to statutory licensees the privilege of engaging in the business which particularly characterizes industrial loan companies or "Morris Plan Banks" (R. 250). The essential characteristic of the business carried on by such companies is that in one form or another interest is charged on the full amount of a loan made and the borrower is

obligated to make the repayment of periodical installments. In the trade or business in which this is conducted in Hawaii the charge is known as "block interest" as distinguished from "simple interest". An examination of such statutes of states on the mainland which have licensed "Morris Plan Banks" or "Industrial Loan Companies" reveals that all of them have the common characteristic of permitting the statutory licensees to recover block interest in one form or another. We are unable to find any statute where a statutory licensee is relegated to the General Usury Statute to determine charges that can be made for loans specifically permitted by special statute. The California statute cited *supra* permits "Industrial Loan Companies" to charge interest at the legal rate in advance, and to receive or require monthly installments on certificates of investment, with or without allowance of interest on such installments.

The Missouri statute (see 1 Rev. Stats. Mo. 1939, c. 33, art. 8, sec. 5421, p. 1308) permits "Loan and Investment Companies" under statutory license to lend money and at the same time, after deducting interest in advance at full legal rate, to require periodic installments on certificates.

The Pennsylvania statute (see 1 Laws of Pa. 1937, No. 66, sec. 13, p. 269) permits "Consumer Discount Companies" to charge, contract for, receive or collect interest on discount at a rate not to exceed six per cent (the legal rate in Pennsylvania) of the principal amount of a contract which is payable in one year by

a single payment, or is payable in equal installments amortized over a period of one year.

The Colorado statute (see 2 Colo Stats. Ann., c. 18, art. 6, sec. 153, p. 305) permits "Industrial Banks" under statutory license to collect interest at ten per cent per annum on amounts of loan and requires borrower to make periodical deposits during the period of the loan, with or without an allowance *or* interest on such deposits.

The Indiana statute (see 5 Burns Ind. Stats. Ann. 1933, Secs. 18-3103 to 18-3125, in Pocket Supplement p. 157) contains a comprehensive code for "Industrial Loan and Investment Companies" and by Sec. 18-3117 (p. 163) provides that the Department of Financial Institutions shall prescribe maximum interest rates and other charges. The rates to be adopted must be uniform throughout the state and shall be adopted after a public hearing.

The Virginia statute (see Virginia Code of 1942, Ann., T. H. 37, c. 166A, Sec. 4168 (6), p. 1494) permits "Industrial Loan Associations" to charge in advance "the legal rate of interest upon the entire amount of the loan" and to require the repayment of the loan in weekly, monthly or other periodical installments.

The Washington statute (see 1 Pierce's Code, Wash. 1939, Secs. 4691-12, p. 1055, and Secs. 4691-8, p. 1057) permits "Industrial Loan Companies" to collect interest at the rate of ten per cent per annum deducted in advance and requires the purchase of certificates

with not less than three per cent interest allowed on the certificates. Under a prior law, Laws (Wash.) of 1923, c. 172, relating to industrial loan companies, licensees could deduct interest in advance at the rate of eight per cent per annum and receive payments on certificates with or without the allowance of interest. The prior law is described in *State v. Hinkle,* 235 Pac. 359 (Wash. 1925), which states that the most characteristic function of industrial loan companies is to receive payment for the sale of written evidences of debt in installments or otherwise.

The Minnesota statute (see 1 Minn. Stats. (1941), c. 53, Sec. 53.04, p. 438) permits "Industrial Loan and Thrift Companies" to deduct interest in advance (one year interest) and requires as a condition of the loan that borrower make periodic payments for a certificate with or without interest over the period of the loan.

The Deputy Bank Examiner testified as to the legislative background of the 1937 Act and stated that it was intended to fill an economic need of the Territory and that the specific charges made by the defendant were in accordance with the uniform administrative construction of the Acts by the Bank Examiner's department (R. 248-276).

For the purpose of considering the reasonableness of the construction of the Hawaiian statute, it is not necessary that a minute examination be made of the various statutes or the rates of interest allowed in the various states in laws relating to industrial loan

companies. The essential characteristic of such companies which our legislature clearly intended to have characterize Hawaiian industrial loan companies is substantially the same: That in one form or another the licensed company can receive what is known in the business as "block interest", i.e., interest in advance with the right to receive periodical repayments in one form or another on the original principal amount—a privilege not enjoyed by unlicensed persons.

The Legisture will not be presumed to have, therefore, done a useless or futile act. As we understand it, the appellant's contention is that Sec. 7053 of the Revised Laws of Hawaii 1935 (now Sec. 8734, Revised Laws of Hawaii 1945) was applicable and that an industrial loan company could have done no more than collect twelve per cent simple interest on the declining balances of principal. It is obvious that such a construction would make the 1937 Act meaningless; first, because in the absence of express statutory prohibition (none exists in Hawaii) anyone can collect interest in advance without violating the general usury laws, and second, because in the 1937 Act it is specifically provided that no person except an industrial loan company can charge interest in the manner permitted by Sec. 6782-N "unless permitted so to do by other territorial law".

> "Interest is not payable in advance unless there is a specific agreement of the parties to that effect. *One may exact interest in advance without violation of the usury laws, in the absence of*

> *express statutory provisions,* and where the agreement of the parties declares interest 'payable in advance', or 'due in advance', such provision is to be given effect as expressing their intention in making the Contract." (Italics ours.)
>
> 30 *Am. Jur.* (Interest), Sec. 11, p. 13;
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> 27 *R.C.L.* (Usury), Sec. 26, p. 222 and a multitude of cases cited in fn. 10.

For purposes of the general usury laws, interest deducted in advance is to be treated the same as compound interest. Thus, although by statute in Hawaii it is specifically provided that "no action shall be maintainable in any court of the Territory to recover compound interest upon any contract whatever" (see Sec. 8737, Revised Laws of Hawaii 1945) it is well established that by contract of the parties after simple interest is due, interest upon interest may be lawfully contracted for and collected.

> *Jones v. Wight,* 8 Haw. 614, 618;
>
> *Bolte v. Akau,* 8 Haw. 742, 743;
>
> *Nawahi v. Trust Co.,* 30 Haw. 359, 379.

In the absence, therefore, of any industrial loan statute, by specific contract interest could have been deducted in advance at the rate of twelve per cent per annum by anyone in the Territory. To hold that the Legislature by its 1937 Act did not give licensees the right to receive "block interest" in advance, *where interest is in fact deducted in advance as in the case at bar,* is to hold that the entire Industrial Loan Statute, and the prescribed system of licensing and regulation, resulted in industrial loan companies hav-

ing no privilege with respect to rates that the general public did not already enjoy. In the absence of the strong reason therefor, a court will not give a statute a construction which brings a futile or unreasonable result, nor will transactions be construed to be usurious "when it may be explained on any other hypothesis". 66 *C. J.* (Usury), pp. 172-173.[4]

We do not concede that there is any ambiguity under the 1937 Act as to the charges the licensees could make thereunder. We do not concede that *Helbush v. Mitchell, supra,* has any application to the case at bar, where the statutory licensee concededly deducted interest in advance, but if there is any doubt as to the meaning of the 1937 Act, under familiar and well established principles of local law (1) the contemporaneous construction placed on the Act by the administrative agency or executive department that prepared the law and was charged with its execution will not be disregarded without cogent reasons.

County of Hawaii v. Auditor, 25 Haw. 372, 377;

see, also,

Frank Nichols, Ltd. v. Vanatta, 33 Haw. 602, 606;

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[4]Appellant's repeated assertion that "plaintiff through its treasurer admitted that it was charging illegal interest" (see Appellant's Br. p. 10, repeated at p. 28) cannot be supported. The record page referred to (R. 133) is devoid of any admission claimed by appellant and in fact includes a statement made by appellant which was stricken from the record (R. 135) because it was inconsistent with the written stipulations and was obviously merely a statement by the appellant of an alleged construction of law.

(2) the statute will be read, together with the general usury statute which is in *pari materia,* so as to give reasonable effect to both statutes.

Territory v. Wills, 25 Haw. 747;

Gamewell Co. v. City and County of Honolulu, 33 Haw. 817;

(3) the entire statute will be taken as a whole to carry out the legislative purpose and intention, and so as to avoid injustice, oppression or an absurd consequence.

Hawaii v. Mankichi, 190 U. S. 197, 212, 213.

The enactment of Act 98, Laws Sp. S. 1941 (now c. 176, Revised Laws of Hawaii 1945), providing a code covering conditional sales in the Territory, is a further step in the direction of adopting salutary laws covering consumer credit in the Territory. Under this statute a conditional vendor of personal property cannot now charge more for his financing charges than a licensed industrial loan company could, if the transaction were financed by such a licensee under the provisions of the 1939 Act.

No reason has been shown why the construction of the 1937 Act by the Bank Examiner (R. 250-276) and the Supreme Court is invalid; that as a part of our system of laws governing money lending (which includes the laws governing small loans companies,[5] building and loan companies,[6] pawn brokers,[7] Indus-

[5]Act 232, S. L. Haw. 1937; Chap. 171, R. L. Haw. 1945.

[6]Act 208, S. L. Haw. 1927, as amended; Chap. 153, R. L. Haw. 1945.

[7]Act 28, S. L. Haw. 1886, as amended; Secs. 7096-7101, R. L. Haw. 1945.

trial loan companies,[8] the Conditional Sales Act,[9] the general civil usury laws,[10] the criminal usury law[11]), such construction is reasonable and accords with the intent and purpose of the Legislature; that such construction cannot be disturbed without upsetting the entire statutory framework, and no cogent or other reason has been shown therefor.

The lower court's construction avoids any constitutional problem, and in the absence of manifest error, it must be accepted as correct.

Waialua Agricultural Co. v. Christian, 305 U. S. 91 (1938);

Walker v. O'Brien, 115 F. (2d) 956 (C.C.A. 9, 1940), cert. denied 312 U. S. 707, 85 L. ed. 1139.

II.

ASSUMING WITHOUT CONCEDING THAT THE STATUTORY CONSTRUCTION OF THE 1937 ACT BY THE SUPREME COURT WAS IN ERROR THE LEGISLATURE OF THE TERRITORY HAD AND EXERCISED CONSTITUTIONAL POWER TO REPEAL THE DEFENSE OF USURY RETROACTIVELY.

The trial court found it unnecessary to construe the 1937 Act because under the 1939 amendment it was made clear that the interest charges made were within permissible limits and if there was any defense

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[8]Act 231, S. L. Haw. 1937, as amended; Chap. 170, R. L. Haw. 1945.

[9]Act 98, Law. Sp. S. 1941; Chap. 176, R. L. Haw. 1945.

[10]Sec. 8734, R. L. Haw. 1945.

[11]Sec. 8736, R. L. Haw. 1945.

of usury at the time the notes sued on were executed, this defense had been repealed and the legislature had constitutional authority to do so. The majority of the Supreme Court adopted the view that the 1937 statute was clear and unambiguous and that the industrial loan company charged no more than they were permitted to do under the statute (R. 303-304). Judge E. C. Peters, in concurring, thought it was unnecessary to consider the language of the 1933 and the 1937 acts because the 1939 Act clarifying the earlier acts was clear and unambiguous and disposed of any defense that the appellant might have had (R. 309).

It is apparent that it will only be necessary for this court to consider the language or the constitutionality of the 1939 Act if this Court determines that the Supreme Court's construction of the 1937 Act is so "manifestly erroneous" as to require a correction. In order to permit the appellant to recover on his counterclaim, it would also be necessary for this court to overrule the decision of the Supreme Court in *Carey v. Discount Corp.,* 36 Haw. 107, stating the common law rule in Hawaii on the recoverability of interest paid. The appellant has not in his brief suggested any reasons why either the statutory construction or the general law in Hawaii on voluntary payments of interest should be revised by this court. In this section of the brief we shall merely summarize what seems to be undisputed law that if the appellant ever had any defenses under the 1937 Act, these defenses have been validly repealed by curative legislation.

(a) The defense of usury is not available to the defendant with respect to the notes sued on by the plaintiff.

The Supreme Court found that the appellee charged no more than it was permitted to charge under the 1937 Act as administered by the Bank Examiner. The Supreme Court found no ambiguity in the 1937 Act, but certainly if there was any ambiguity in this Act, it was corrected in the 1939 Act.

Section 2 of Act 75, *Session Laws of Hawaii 1939,* reads as follows:

> "Section 2. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of the making of such note or other contract, if such note or contract provides for, and there has been collected thereon by such payee or obligee or the holder thereof, no greater rate or amount of interest or other charges or both, than those that would have been permitted under this Act if it had been in force when such note or contract was made."
>
> Sec. 2, Act 75, *S. L. Haw. 1939,* 262.

It is wholly beyond dispute that plaintiff did not collect a "greater rate or amount of interest or other charges or both, than those that would have been permitted under this act (1939 Act) if it had been in force when such note or contract was made". This is made as clear in the 1939 Act as language can make anything clear. By Section 6782 (a) of the 1939 Act, providing definitions, it is specifically provided that the right permitted to have interest "deducted in advance" includes any of the following practices:

> "(a) Such interest may be computed on the principal amount of the contract (at the maximum rate or rates mentioned in section 6782-L, or at any lesser rate or rates) for the duration of the contract as though such principal amount were to remain outstanding and unpaid for the full term of the contract, and such interest and other charges may be deducted from such principal amount at the time the loan is made and retained by the lender and applied (in the case of such other charges) for the purposes authorized by this chapter, notwithstanding the fact that periodical payments of principal are required by the contract and that the borrower does not receive the full amount of such principal, but only the balance thereof after such deductions.
>
> "(b) The interest may be computed (at the maximum rate or rates mentioned in section 6782-L, or at any lesser rate or rates) upon the amount to be actually received by the borrower, as though said amount were to remain outstanding and unpaid for the full term of the contract, and such interest and other charges may be added to said amount to be actually received by the borrower,

and the total amount produced by such addition may then be constituted the principal amount of the contract, and the amount of the interest and other charges so added may then nevertheless be deducted from said principal amount and retained by the lender at the time the loan is made, notwithstanding the fact that periodical payments of said principal amount are required by the contract and that the amount actually received by the borrower is less, by the amount of the interest and other charges so added thereto, than said principal amount; provided, that no loan upon which interest and other charges have been added for the purpose of determining the principal amount of the contract shall be held usurious if the interest and other charges so added do not exceed the amount of interest and other charges which would be deductible from a loan of the same principal amount if computed in the manner set forth in paragraph (a) of this item (9)."

Act 75, *S. L. Haw. 1939,* 253-254.

The specific interest rates and other charges are set forth at length in *Section 6782-L* and the provisions thereof applicable to the notes in the case at bar are set forth in *subparagraphs 2(b), (c) and (d)* as follows:

"(b) Where interest is payable or deducted in advance upon a contract payable in a period of more than 18 months it shall not exceed an amount computed in the manner set forth in item (9) of section 6782-A, as follows: 12 per cent per annum for the first 18 months, plus 9 per cent per annum for the next 12 months (or portion thereof) plus

6 per cent per annum for the next 12 months (or portion thereof), plus 3 per cent per annum for the next 6 months (or portion thereof), of such period, as the case may be.

"Interest shall not be deductible in advance for more than four years.

"For example, upon a contract, the principal amount of which is $120.00, payable in 24 months, in monthly installments of $5.00, the maximum interest which may be deducted in advance under this section is computed as follows:

12% per annum of $120.00 for first 18 months	$21.60
9% per annum of $120.00 for next 6 months	5.40
Total interest deductible in advance from the principal amount of the contract	$27.00

"(c) In addition to collecting or deducting interest in advance, as aforesaid, the company may require and receive repayment of the principal amount of the contract in uniform weekly, monthly, or other periodical instalments with the privilege to the company (subject to the interest refund provisions of this section where applicable) to declare the entire unpaid balance due and payable in the event of default in the payment of any instalment.

"(d) In addition to requiring and collecting interest in the manner and at the rates hereinbefore provided for, the company may also require and receive the payment of interest at not to exceed 12 per cent per annum from the date of delinquency on any principal instalment or por-

tion thereof which remains unpaid on the date of maturity, of such instalment where there has been no extensions or deferment by mutual agreement, or where the amount extended or deferred is not paid, on the due date agreed upon."

Act 75, *S. L. Haw. 1939,* Sec. 6782-L, 2(b), (c) and (d).

It is only necessary to take the Plaintiff's Exhibits A-1 to H-1 (R. 22-42) and the Defendant's Exhibits 1-A to 38-A (R. 191-238) which were stipulated by the parties (R. 56) as showing the detailed facts with respect to each note mentioned in the plaintiff's complaint and in the defendant's counterclaim and to place the exhibits alongside the statute and it will be apparent that the charges made come well within the framework of the charges permitted under the 1939 Act.

(b) The defense of usury can be repealed retroactively.

It is now settled law in Hawaii that any and all rights with respect to usury are of statutory origin created by the legislature (*Carey v. Discount Corporation,* 36 Haw. 107, 113). The statutory history of usury in the Territory of Hawaii which had careful, detailed study in the foregoing case fully justifies the conclusion that the recovery of unlawful interest voluntarily paid did not form a part of the common law of this Territory (see 36 Haw. 117).

The general rule with respect to the retroactive repeal of usury statutes is clearly stated in 6 *R.C.L., Constitutional Law,* Sec. 348, p. 351, as follows:

"It is now generally recognized that the legislature may repeal a usury law, and that no one has any vested right to take advantage of such laws, nor does their repeal operate as an impairment of the obligation of contracts. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of such a statute, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for the purpose of its own, and not because it affects the merits of his obligations; and that, whatever the statute gives, under such circumstances, as long as it remains in fieri, and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract."

In 66 *C.J., Usury,* p. 169 the general rule is laid down as follows:

"Sec. 55. b. *Contracts Previously Usurious.* (1) *In General.* The defense of usury is a statutory defense not founded on any common-law right, either legal or equitable. It is generally considered not to be in the nature of a vested constitutional right secure against legislative invasion, but that it constitutes a privilege, and that it is within the power of the legislature to take it away. Thus the right of a debtor under a usurious contract *to refuse to pay any interest, or to offset against the original debt interest already paid, or to recover usury, has been held not to be a vested right.* * * *" (Italics ours.)

This court has conclusively determined the nature of rights arising out of usury statutes and has settled any question as to the constitutionality of retroactive repeal of such statutes.

In *Petterson v. Berry,* 125 Fed. 902 (C.C.A. 9th, 1903), the court had for consideration a case brought in the District Court of the United States for the District of Alaska on a promissory note bearing interest at twelve per cent. Defendants pleaded usury under an Oregon statute made applicable by the Organic Act to the Territory of Alaska under which contracts providing for interest in excess of eight per cent were deemed usurious with a forfeiture of the entire debt. By later act applicable to Alaska, the rate of interest was changed to twelve per cent and the question arose as to whether the latter statute should be construed retroactively and, if so construed, whether the statute was constitutional. This court said at page 905:

> "It is well settled that the defense of usury, either to the principal of a contract debt or to the interest thereon, is in the nature of a penalty or forfeiture, which may be taken away by legislation, both as respects previous as well as subsequent contracts. This is sufficiently shown by the case of Ewell v. Daggs, 108 U.S. 143, 2 Sup. Ct. 408, 27 L. Ed. 682, but we add other references."

The court cited a multitude of cases, all of which are in accord with the principle announced. In *Ewell v. Daggs,* 108 U. S. 143, 27 L. Ed. 682, the constitutionality of a retroactive repealing statute was in

issue. In a suit brought to foreclose a mortgage the borrower set up by way of defense that he had received in cash only $2,000.00 and had executed a promissory note for $3,556.00, payable in three years and that the note was given for interest at the rate of twenty per cent per annum, compounded annually, on which defendant had paid $1,745.00. A Texas statute in force at the time the transaction was entered into made a contract for interest in excess of twelve per cent per annum void as to the entire interest with the right to recover principal only. Prior to the bringing of suit the usury statute had been repealed and the question arose whether the retroactive repeal could be constiutionally applied to the notes which were usurious when executed. The court considers the nature of the defense of usury and points out the distinction between acts which are *mala in se* and those which are *mala prohibita,* pointing out that a usury statute falls under the second classification; where the only bar to recovery is a statutory bar the legislative branch which imposed the statutory limitation may remove the same retroactively. The court uses the following significant language at pages 684, 685:

> "The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally de-

cided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. *And such laws, operating with that effect, have been upheld as against all objections, on the ground that they deprived parties of vested rights, or impaired the obligation of contracts.* (Citing cases.)

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the Act, the more general and deeper principle on which they are to be supported is, that the right of a defendant *to avoid his contract is given to him by statute, for purposes of its own,* and not because it affects the merits of his obligation; and that, whatever the statute gives, under such circumstances, as long as it remains *in fieri,* and not realized, by having passed into a completed transaction, may by a subsequent statute be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract. The benefit which he has received as the consideration of the contract, which contrary to law he actually made is just ground for imposing upon him by subsequent legislation, the liability which he intended to incur. That principle has been repeatedly announced and acted upon by this court. (Citing cases.)

"The right which the curative or repealing Act takes away in such a case is the right in the party to avoid his contract, a naked legal right which is usually unjust to insist upon, and which no constitutional provision was ever designed to pro-

tect." *Ewell v. Daggs* (italics ours), 108 U. S. 143, 27 L. Ed. 682.

The rule of this circuit has been uniformly followed in the state courts.

Curtis v. Leavitt, 15 N. Y. 9, 154;

Mechanics Bank and Bldg. Assn. v. Allen, 28 Conn. 97 (1859);

Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236;

Iowa Savings & Loan Assn. v. Heidt, 107 Iowa 297, 77 N. W. 1050 (1899);

Jefferson Standard Life Ins. Co. v. Dattel, 83 F. (2d) 504 (C.C.A. 5th, 1936);

Hinman v. Goodyear, 56 Conn. 210, 14 Atl. 804 (1888);

Fenton v. Markwell, 52 P. (2d) 297 (1935).

For collection of cases see 87 *A. L. R.* 462 at 470 under Title *"IV. Modification or repeal of usury statute as affecting existing usurious contract."*

(c) The appellant cannot rely upon a claim of usury to maintain a setoff or counterclaim for payments of interest already made.

Carey v. Discount Corporation (supra), states the settled law in Hawaii as to the legal effect of an overpayment of interest:

1. There is no common law right to recover usurious interest in Hawaii.

"By Act 137 of the Session Laws of Hawaii 1931, section 1483, supra, as amended, was repealed and section 7053 was enacted as a sub-

stitute therefor. This Act, for the first time, declared that if a greater rate of interest than the maximum authorized by the statute shall be contracted for, the contract shall not, by reason thereof be void. After the foregoing declaration as to the validity of a contract for a greater rate of interest than is authorized by the statute, the rights and liabilities of the parties to the contract in an action on the contract are set forth in the statute and provide ample protection to the borrower when sued upon the contract. In fact, the statute gives the borrower more relief when sued on the contract than plaintiff seeks in this case. *The statute makes no specific reference to the rights and liabilities of the parties, where, as here, the contract has been performed and the borrower sues to recover the usurious interest paid. That our lawmakers never subscribed to the ancient common law theory of inherent vice in the taking of interest for the loan of money, is too clear to admit of argument.'' Carey v. Discount Corporation,* 36 Haw. 113, 114. (Italics ours.)

2. The statutes of usury contain all the law applicable to usury in Hawaii.

''It seems clear to us, and no one has contended otherwise, that section 7053, which we have set forth above, defines fully the rights and liabilities of the parties to usurious contracts in suits upon the contract, and if different rights and liabilities existed at common law, they have been superseded by our statute on the subject. In other words, in a suit upon a contract for the payment of interest claimed by the defendant to be usurious, section 7053 contains all the law applicable to the controversy. Does it likewise supersede the common

law applicable to a suit to recover usurious interest after full performance of the contract?" *Carey v. Discount Corporation,* 36 Haw. at 114, 115.

3. The statutes have rejected the common law on which recovery is allowed elsewhere.

> "The question then is, has our statute (Sec. 7053) rejected the principle underlying the common law rule permitting a borrower to recover the excess interest paid? If recovery at common law was based upon the fact that a contract to pay usury is void, then the declaration of our statute that 'If a greater rate of interest than one per centum per month shall be contracted for, the contract shall not, by reason thereof, be void,' *certainly rejects the common law by principle upon which recovery was based.*" *Carey v. Discount Corporation,* 36 Haw. 117. (Italics ours.)

At the time that the Industrial Loan Act was adopted in 1937 by Act 231, S. L. Haw. 1937, there was also adopted Act 232, S. L. Law. 1937, relating to small loan companies, and also Act 222, S. L. Haw. 1937, amending the Criminal Usury Statute. The 1937 amendment to the Criminal Usury Statute added the words "except as otherwise permitted by law" to the section making the receipt of interest in excess of one per cent per month a criminal offense. Since the three statutes, adopted virtually simultaneously, relate to the same subject matter it is proper to consider them in *pari materia.* So considered, it is apparent that the legislature did not intend to set up a statutory scheme of charges for special types of money lenders furnish-

ing consumer credit and, at the same time, declare that the exaction of interest so licensed constitutes criminal usury. But this is exactly the position contended for by the defendant.

But assuming *arguendo* that there is any basis for a consideration of the Criminal Usury Statute, it is clear that in 1939, the Legislature, exercising its constitutional power, made the Criminal Usury Statute wholly inapplicable to industrial loan companies, first, by providing specifically in Section 6782-W of the 1939 Act (p. 262), that the provisions of the general usury statute (Sec. 7053 R. L. Haw. 1935 (now Sec. 8734 R. L. Haw. 1945)), and the Criminal Usury Statute (Sec. 7055 R. L. Haw. 1935 (now Sec. 8736 R. L. Haw. 1945)) shall be inapplicable to industrial loan companies; and second, by providing that no action to recover interest paid to industrial loan companies could be recovered.

Section 4 of Act 75, S. L. Haw. 1939 imposes a clearly constitutional statutory block, said statute reading as follows:

> "Section 4. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that no action to recover any interest or charges alleged to have been paid or any amount alleged to have been paid, as such interest or charges, by any obligor under any note or other contract made on or after the effective date of Act 154 of the Session Laws of Hawaii, 1933, and before the effective date of this Act, in excess of the interest and charges which were legally chargeable or collectible under the

law then in effect and applicable to the lender, shall lie or be instituted or prosecuted against any person, firm, association or corporation which was duly licensed under either said Act 154, or Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time such note or contract was made." (Sec. 4, Act 75, S. L. Haw. 1939, 263.)

In view of the decision in the *Carey v. Discount Corporation* case it can no longer be argued that there is any common law right of recovery of interest paid. Any rights of recovery or setoff in Hawaii must depend upon the statutory privilege granted either by the Civil Usury Statute or the Criminal Usury Statute, or by both. It is clear that the Legislature of the Territory of Hawaii has withdrawn any privilege that ever existed to recover such interest so far as statutory licensees mentioned in the Act are concerned. It remains, therefore, only to determine whether this withdrawal was constitutional.

It is clear that no person has a vested right to recover alleged usurious interest already paid and that where a statute validates prior contracts the legislature may retroactively repeal any claims for interest already paid.

Penzinger v. West American Finance Co., 74 P. (2d) 252 (Calif. 1937);

Wolf v. Pacific Southwest Discount Corporation, 74 P. (2d) 263;

Iowa Savings and Loan Association v. Heidt, 107 Iowa 297, 77 N. W. 1050;

Alston v. American Mortgage Co., 157 N. E. 374 Ohio (1927), 156 N. E. 606;

Holmes v. French, 68 Me. 525;

Jefferson Standard Life Ins. Co. v. Dattel, 83 F. (2d) 504 (C.C.A. 5th 1936);

Hinman v. Goodyear, 56 Conn. 210, 14 Atl. 804 (1888);

Fenton v. Markwell, 52 P. (2d) 297 (1935);

Ewell v. Daggs, 108 U. S. 143, 27 L. Ed. 682;

Petterson v. Berry, 125 F. 902 (C.C.A. 9th) (1903);

Curtis v. Leavitt, 15 N. Y. 9;

Mechanics Bank and Bldg. Assn. v. Allen, 28 Conn. 92;

Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236.

In *Penzinger v. West American Finance Co.,* supra, the court had for consideration the retroactive repeal of the general usury statute by a constitutional provision. Suit had been brought against a finance company to recover treble damages for excess interest paid. The court uses the following language, page 257:

> "There can be no doubt that if the constitutional provision did in fact repeal the Usury Law of 1918 without a saving clause, plaintiff's cause of action fell with such repeal. The right to recover treble damages given by section 3 of the Usury Law is a purely statutory remedy, not existing at common law, and is likewise a penalty imposed upon the lender. *The rule in such cases is clear that where no rights are vested the right falls and the statutory remedy ceases to exist*

> *upon the repeal of the statute without a saving clause unless the right has been converted into a final judgment prior to a repeal of the statute.* Although the cause of action upon which the judgment herein is based, accrued prior to the date of the alleged repeal, the judgment was entered subsequent to that date. The repeal of the statute without a saving clause would therefore wipe out the cause of action and render the judgment of no legal validity." (Citing cases.) (Italics ours.)

In *Wolf v. Pacific Southwest Discount Corporation,* supra, the court considers the same modification of the California Usury Law and holds that where the specific type of finance company is exempted from the provisions of the general usury law, this disposes of all causes of action through and prior to the adoption of the amendment, page 264.

> "It will be further noted that the constitutional amendment repealing the provisions of the usury law as to those excepted classes contains no saving clause as to causes of action accruing prior to the adoption of said amendment. A repeal of the statute, or the amendment thereof, resulting in a repeal of the statutory provisions under which the cause of action arose wipes out the cause of action unless the same has been merged into a final judgment." (p. 264.)

In *Ewell v. Daggs,* supra, the United States Supreme Court was considering the repealed Texas usury statute which in *haec verba* declared a usurious contract to be void and of no effect. In holding that the retroactive statute was constitutional, the court used this language (p. 684):

"It is quite true that the usury statute referred to, declares the contract of loan, so far as the whole interest is concerned, to be void and of no effect. But these words are often used in statutes and legal documents, such as deeds, leases, bonds, mortgages and others, in the sense of voidable merely, that is, capable of being voided, and not as meaning that the act or transaction is absolutely a nullity, as if it never had existed, incapable of giving rise to any rights or obligations under any circumstances. Thus we speak of conveyances void as to creditors, meaning that creditors may avoid them, but not others. Leases which contain a forfeiture of the lessee's estate for nonpayment of rent, or breach of other conditions, declare that on the happening of the contingency the demise shall thereupon become null and void, meaning that the forfeiture may be enforced by re-entry; at the option of the lessor. It is sometimes said that a deed obtained by fraud is void, meaning that the party defrauded may, at his election, treat it as void.

"All that can be meant by the term, according to any legal usage, is that a court of law will not lend its aid to enforce the performance of a contract which appears to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the Land. Broom, Leg. Max., 732."

It is sufficient to point out that the only statute dealing with civil rights arising out of usury in the Territory of Hawaii was Section 7053 R. L. Haw. 1935 (now Sec. 8734 R. L. Haw. 1945) which, as pointed out in *Carey v. Discount Corporation,* is a

specific legislative declaration that the contract shall not by reason of usurious interest be void.

Thus, it is seen that by clear determination of the United States Supreme Court (followed by this court in *Petterson v. Berry,* supra, page 32), even a statutory provision that a usurious contract is void may be retroactively repealed and void contracts validated without disturbing constitutional rights. In the case at bar, it is not necessary for the court to go to the full extent of the decisions above referred to for it is clear that even in the absence of the 1939 Act, under the common law rule enunciated in *Carey v. Discount Corporation,* the appellant could not have recovered on his counterclaim. No argument has been suggested or advanced in the defendant's brief as to why the Legislature could not constitutionally clarify the statutes behind which the defendant seeks to hide to avoid undertakings entered into in good faith with the plaintiff.

It is submitted that it is not necessary to consider the 1939 Act because the construction of the Supreme Court sustained the administrative construction of the 1937 Act. It is not only "manifestly erroneous" but is the only reasonable construction that would make the legislative act ineffectual and meaningless.

CONCLUSION.

The appellant has admitted and the lower courts have found as a fact that all the loans which are the subject of the complaint were made by the plaintiff

and have been unpaid; there is no dispute that all such loans were made after the 1937 Act went into effect and that the charges made were substantially less than the charges permitted under the rulings of the Bank Examiner, sustained as valid by the Supreme Court. It has been demonstrated that the Bank Examiner's interpretation of the statute and the construction of the Supreme Court are reasonable and are in accordance with settled canons of statutory construction. Therefore, aside from any consideration of the 1939 clarification, the judgment of the Supreme Court would have to be affirmed.

Assuming only for purposes of argument that the charges exacted by the appellee exceeded at the time the statutory limits, it is undisputable that the Bank Examiner's and the Supreme Court's construction of the statute was validated retroactively by the 1939 amendment. The Legislature had constitutional power to validate the transactions retroactively.

Accordingly, it is respectively submitted that the judgment of the Supreme Court should be affirmed.

Dated, Honolulu, T. H. this 9th day of June, 1948.

Respectfully submitted,
J. Russell Cades,
Attorney for Appellee.

Smith, Wild, Beebe & Cades,
Carlsmith & Carlsmith,
Of Counsel.

(Appendices I, II, III and IV Follow.)

Appendices.

Appendix I

Act 154 of the Session Laws of Hawaii 1933.

An Act to license and regulate the business of making loans and to provide exemption and punishment for the violation of this Act.

* * * * * * *

Section 4. Powers. Every person, co-partnership or corporation under the provisions of this Act shall have power:

(a) To loan money on personal security, or otherwise, and to deduct interest therefor in advance at the rate of one per cent per month, or less and, in addition, may receive and require uniform weekly or monthly installments.

Appendix II

Act 231 of the Session Laws of Hawaii 1937.

An Act to amend Title XXIV of the Revised Laws of Hawaii 1935, by Adding thereto a new chapter to be numbered and known as Chapter 223-A and Forty-two New Sections to be Numbered 6782, 6782-A, 6782-B, 6782-C, 6782-D, 6782-E, 6782-F, 6782-G, 6782-H, 6782-I, 6782-J, 6782-K, 6782-L, 6782-M, 6782-N, 6782-O, 6782-P, 6782-Q, 6782-R, 6782-S, 6782-T, 6782-U, 6782-V, 6782-W, 6782-X, 6782-Y, 6782-Z, 6782-AA, 6782-BB, 6782-CC, 6782-DD, 6782-EE, 6782-FF, 6782-GG, 6782-HH, 6782-II, 6782-JJ, 6782-KK, 6782-LL, 6782-MM, 6782-NN and 6782-OO; to Provide for the establishment, operation, maintenance, government, powers, duties, license fees, control and regulation of industrial loan and investment companies as therein defined: to Provide for the administration of the Act: to Confer certain powers and impose certain duties in respect to such companies upon the Treasurer and Deputy Bank Examiner of the Territory of Hawaii: to Impose certain penalties for violations thereof and repealing Chapter 233 of the Revised Laws of Hawaii 1935.

* * * * * * *

Sec. 6782-N. Rate or rates of interest. No industrial loan and investment company, subject to the provisions of this chapter, shall directly or indirectly charge, contract for, collect or receive any interest, discount, fees, charges or other consideration on any loan or loans made by it except as provided by this section.

Interest on loans made by any industrial loan and investment company, subject to this chapter, may be deducted in advance at the rate of but not exceeding one per centum (1%) per month, and in addition, the company may require and receive weekly, monthly or other periodical installments with the privilege to the company to declare the entire unpaid balance due and payable in the event of default in the payment of any installment. No person, firm, association, partnership or corporation (not holding a license issued under this chapter) shall charge, contract for, collect or receive interest, discounts, fees, charges or other consideration on any loan or loans in the amount or in the manner provided in this section, unless permitted so to do by other territorial law.

Appendix III

Act 75 of the Session Laws of Hawaii 1939.

An Act Relating to the business of industrial loans, amending Chapter 223A of the Revised Laws of Hawaii 1935, as enacted by Act 231 of the Session Laws of Hawaii 1937, providing for the purging of usury of certain loans heretofore made by licensees under previous laws, if adjusted to conform to this act, and restricting the defense of usury and actions based on the usurious nature of certain loans heretofore made by such licensees.

* * * * * * *

Section 1. Chapter 223A of the Revised Laws of Hawaii 1935, as enacted by Act 231 of the Session Laws of Hawaii 1937, relating to the business of industrial loans is hereby amended to read as follows:

"Sec. 6782. Application. This chapter shall be applicable to every person, firm, partnership, company, corporation and unincorporated association engaged in or attempting to engage in business as an industrial loan company or which shall hereafter be organized for the purpose of engaging or attempting to engage in the industrial loan business, as defined in this chapter, and which charges, contracts for or receives on any loan a greater rate of interest, discount or consideration than would be permissible under the provisions of section 7052.

"Sec. 6782A. Definitions. As used in this chapter and unless a different meaning appears from the con-

text: * * * (9) where interest or other charges, or both, are authorized or permitted by this chapter to be 'paid in advance', 'deducted in advance', 'collected in advance', 'received in advance', or 'charged in advance', or where any or all of them are expressed to be 'payable', 'deductible', 'collectible', or 'chargeable', 'in advance', or where any expressions of similar import are used, they shall be construed as authorizing and permitting, (in addition to any other practices permitted by this chapter) any of the following practices:

(a) Such interest may be computed on the principal amount of the contract (at the maximum rate or rates mentioned in section 6782-L, or at any lesser rate or rates) for the duration of the contract as though such principal amount were to remain outstanding and unpaid for the full term of the contract, and such interest and other charges may be deducted from such principal amount at the time the loan is made and retained by the lender and applied (in the case of such other charges) for the purposes authorized by this chapter, notwithstanding the fact that periodical payments of principal are required by the contract and that the borrower does not receive the full amount of such principal, but only the balance thereof after such deductions.

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"Sec. 6782-L. Interest rates; other charges; refunds.

1. No industrial loan company shall directly or indirectly charge, contract for, collect or receive any

interest, discount, fees, charges or other consideration on any loan made by it except as provided by this section.

2. An industrial loan company may charge, contract for, receive or collect in advance interest or discount at any rate which does not exceed the following maximum rate for the particular period and type of contract hereinafter set forth, computed in the manner set forth in item (9) of section 6782-A, at the inception of the contract, to-wit:

(a) Where interest is paid or deducted in advance for a period of not more than 18 months upon any contract (whether the principal amount of such contract is payable in one payment at the end of the maturity period thereof or in instalments), it shall not exceed 12 per cent per annum computed in the manner set forth in item (9) of section 6782-A at the inception of the contract.

(b) Where interest is payable or deducted in advance upon a contract payable in a period of more than 18 months, it shall not exceed an amount computed in the manner set forth in item (9) of section 6782-A, as follows: 12 per cent per annum for the first 18 months, plus 9 per cent per annum for the next 12 months (or portion thereof), plus 6 per cent per annum for the next 12 months (or portion thereof), plus 3 per cent per annum for the next 6 months (or portion thereof), of such period, as the case may be.

Interest shall not be deductible in advance for more than four years.

For example, upon a contract, the principal amount of which is $120.00, payable in 24 months, in monthly instalments of $5.00, the maximum amount of interest which may be deducted in advance under this section is computed as follows:

12% per annum of $120.00 for first 18 months,	$21.60
9% per annum of $120.00 for next 6 months,	5.40
Total interest deductible in advance from the principal amount of the contract,	$27.00

(c) In addition to collecting or deducting interest in advance, as aforesaid, the company may require and receive repayment of the principal amount of the contract in uniform weekly, monthly or other periodical instalments with the privilege to the company (subject to the interest refund provisions of this section where applicable) to declare the entire unpaid balance due and payable in the event of default in the payment of any instalment.

(d) In addition to requiring and collecting interest in the manner and at the rates hereinbefore provided for, the company may also require and receive the payment of interest at not to exceed 12 per cent per annum from the date of delinquency on any principal instalment or portion thereof which remains unpaid on the date of maturity, of such instalment where there has been no extensions or deferment by mutual agreement, or where the amount extended or deferred is not paid on the due date agreed upon.

* * * * * * *

"Sec. 6782-X. Short Title. This Act shall be known and may be cited as 'The Industrial Loan Act'."

Section 2. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of the making of such note or other contract, if such note or contract provides for, and there has been collected thereon by such payee or obligee or the holder thereof, no greater rate or amount of interest or other charges or both, than those that would have been permitted under this Act if it had been in force when such note or contract was made.

Section 3. Insofar as, and to the extent that it lies within the power of the legislature so to enact, it is hereby provided that the defense of usury provided by chapter 232, and particularly by section 7053, of the Revised Laws of Hawaii 1935, shall not be available to any party in any action brought upon or arising out of any note or other contract to pay or secure the payment of money heretofore made or executed to

any person, firm, association or corporation as the payee or obligee of such note or contract, which payee or obligee was duly licensed under Act 154 of the Session Laws of Hawaii 1933, or under Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time of making such note or other contract, upon or in which note or contract a greater amount or rate of interest or other charges or both has been contracted for or collected by the payee or holder thereof than was permitted under the statutes in force when said note or contract was made, provided the holder thereof, within thirty days after the effective date of this Act, shall refund or credit, to the obligors on said note or contract, the excess, if any, of such interest or charges or both which has been collected over and above the interest and charges which could legally have been charged or collected under this Act if this Act had been in effect at the time such loan or contract was made, and shall not thereafter charge or collect from such obligors on account of said note or contract any interest or charges in excess of those chargeable or collectible upon a loan made under this Act.

Section 4. Insofar as, and to the extent that, it lies within the power of the legislature so to enact, it is hereby provided that no action to recover any interest or charges alleged to have been paid, or any amount alleged to have been paid as such interest or charges, by any obligor under any note or other contract made on or after the effective date of Act 154 of the Session Laws of Hawaii 1933, and before the

effective date of this Act, in excess of the interest and charges which were legally chargeable or collectible under the law then in effect and applicable to the lender, shall lie or be instituted or prosecuted against any person, firm, association or corporation which was duly licensed under either said Act 154, or Act 231, Series D-140, of the Session Laws of Hawaii 1937, at the time such note or contract was made.

This section shall also apply to causes of action pending on the effective date of this Act, upon which no final judgment has been entered on said date."

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(The foregoing sections constitute a portion of Chapter 170, Revised Laws of Hawaii 1945.)

Appendix IV

Section 8734, Revised Laws of Hawaii 1945.

Sec. 8734. Usury not recoverable. If a greater rate of interest than one per centum per month shall be contracted for, the contract shall not, by reason thereof, be void. But if in any action on such contract proof be made that a greater rate of interest than one per centum per month has been directly or indirectly contracted for, the plaintiff shall only recover the principal and the defendant shall recover costs. If interest shall have been paid, judgment shall be for the principal less the amount of interest paid; provided, however, that this section shall not be held to apply to contracts for money lent upon bottomry bonds or upon other maritime risks nor to loans made under the provisions of chapter 170. (C. C. 1859, s. 1483; am. L. 1898, c.4, s.4; R.L. 1925, s. 3588; am. L. 1931, c. 137, s. 1; R.L. 1935, s. 7053; am. L. 1939, c. 75, pt. of s. 1 (6782 W).)